UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM KENDALL and ANNETTE STEMHAGEN, Plaintiffs, v. ONEBEACON AMERICA, Defendant.	CIVIL ACTION No. 06-1895

MEMORANDUM/ORDER

March 30, 2007,

Before the court are (1) plaintiffs' timely motion to remand this case to the Court of Common Pleas for the County of Philadelphia (Docket No. 8, filed June 1, 2006), and (2) defendant's Rule 12(b)(6) motion to dismiss plaintiffs' complaint (Docket No. 3, filed May 5, 2006). Because I find that this court lacks removal jurisdiction under 28 U.S.C. § 1441, I will grant plaintiffs' motion to remand and deny the defendant's motion to dismiss as moot.

Background

This case was originally filed in April 2006 in the Court of Common Pleas of Philadelphia County. The plaintiffs in that action were William Kendall and his wife,

Annette Stemhagen, who are citizens of Pennsylvania, and the defendant was One Beacon Insurance Company ("OBIC"), which is a Pennsylvania corporation. Plaintiffs' state-court complaint alleged a cause of action on a unilateral contract theory, based on OBIC's alleged actions in initiating a claim settlement process to resolve plaintiffs' potential claims for sub-par stucco siding and other construction defects against the builders of their home, Gambone Brothers Development Company ("Gambone"). On May 4, 2006, an entity called OneBeacon America ("OBA")—a Massachusetts corporation—which was not a named defendant in the Court of Common Pleas, filed a notice of removal to this court. The ground of federal jurisdiction alleged to provide the basis for removal was diversity of citizenship. *See* 28 U.S.C. §§ 1441(a)–(b), 1332(a)(1).

In its notice of removal, OBA asserts that it is the proper defendant in the state court action and was merely "improperly designated in the complaint as 'OneBeacon Insurance Company.'" (Notice of Removal 1.) In its brief opposing plaintiffs' motion to remand, OBA makes the similar claim that, as the actual insurer of Gambone, it is the "real party in interest" in plaintiffs' suit. Therefore, argues OBA, (1) it has standing to remove this case to federal court, and (2) removal is proper based on diversity of citizenship. (Def.'s Br. Opp. Remand 4–5.)

Both in support of their motion to remand and in opposition to OBA's motion to dismiss, plaintiffs argue that they did *not* err in naming OBIC as a defendant. (*See, e.g.*, Pl.'s Br. in Support of Motion to Remand at 5 ("Plaintiffs intended to sue and in fact sued

OBIC, which is without a doubt a Pennsylvania citizen.").) Plaintiffs argue (1) that OBIC's presence as a party is incompatible with diversity, and thus with removal jurisdiction,[1] and (2) that OBA lacks standing to remove, as it is not a party to the state suit.[2]

Standard of review for motions to remand

In *Abels v. State Farm Fire & Cas. Co.*, Judge Higginbotham aptly summarized "a number of general principles that should guide the exercise of the federal courts' removal jurisdiction":

> Because lack of jurisdiction would make any decree in the case void and the continuation of the litigation in federal court futile, the removal statute should be strictly construed and all doubts should be resolved in favor of remand. The defendant's right to remove is to be determined according to the plaintiffs' pleading at the time of the petition for removal, and it is the defendant's burden to show the existence of federal jurisdiction.

770 F.2d 26, 29 (3d Cir. 1985) (citations omitted).

Therefore, OBA bears the burden to show that the exercise of removal jurisdiction is proper upon the proffered ground of diversity of citizenship. OBA's immediate

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[1] *See, e.g., Lincoln Property Co. v. Roche*, 546 U.S. 81, 126 S. Ct. 606, 610 (2005) ("Defendants may remove an action on the basis of diversity of citizenship if there is complete diversity between all named plaintiffs and all named defendants, and no defendant is a citizen of the forum State."); *see also* 28 U.S.C. §§ 1332(a), 1441(b).

[2] The questions of "standing" and diversity largely merge into a single inquiry—whether OBA, rather than OBIC, is the proper defendant in this suit. Because I find that OBA has not met its burden to show that OBIC is a "fraudulently joined" party, *see* discussion *infra*, and because OBIC's continued presence defeats complete diversity and requires remand in any case, I do not discuss the specific issue of OBA's standing.

problem is that plaintiffs have named OBIC, a non-diverse party, as the sole defendant. "As a general proposition, plaintiffs have the option of naming those parties whom they choose to sue." *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 110 (3d Cir. 1990). It is undisputed that, on its face, OBIC's presence in the case is inconsistent with diversity and forecloses OBA's removal.

However, it is also well established that a complainant cannot defeat removal by "fraudulently join[ing] a party to destroy diversity." *Boyer*, 913 F.2d at 111. Where a party is shown to be fraudulently joined, federal diversity jurisdiction will be determined as if that party were not present in the case. *See Abels*, 770 F.2d at 29. Without considering OBIC as a party, diversity of citizenship would exist, and removal would be proper (assuming OBA was substituted as the proper party). Therefore, OBA can avoid remand if—but only if—it can show that OBIC is "fraudulently joined."[3]

Fraudulent joinder

Fraudulent joinder is a term of art—a demonstration of outright fraud or bad faith

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[3] OBA couches its argument as one that it is the "real party in interest," claiming that OBIC was mistakenly named as defendant and that OBA is the true party. However, the cases cited by OBA discuss the problem in terms of "fraudulent joinder" doctrine, *see, e.g.*, *Stanger v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.)*, No. 03-20086, 2003 U.S. Dist. LEXIS 9839, at *7 (E.D. Pa. May 29, 2003) ("The presence of a party fraudulently joined cannot defeat removal."), and I therefore treat OBA's argument as having two parts: (1) that OBIC was fraudulently joined, and (2) that OBA is the proper defendant because it is the "real party in interest." However, because my decision that OBIC was not fraudulently joined precludes diversity and hence forecloses this court's jurisdiction, I do not address the additional question of whether OBA is *also* a proper or necessary party.

is not necessary to render a party fraudulently joined. Rather, the standard consists of two independently sufficient tests—one objective and one subjective. *See Abels*, 770 F.2d at 32. A party is "fraudulently joined"—and therefore not considered for diversity purposes—"'where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, *or* no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.'" *Boyer*, 913 F.2d at 111 (emphasis added) (quoting *Abels*, 770 F.2d at 32). There is no allegation in this case of fraud or lack of good faith in plaintiffs' naming of OBIC as a defendant. Therefore, the question of fraudulent joinder will rise or fall on the objective test—i.e., whether OBA has demonstrated that the claim against the OBIC "fails to state a cause of action . . . and the failure is obvious according to the settled rules of the state." *Id.* at 111–12 (quoting 1A *Moore's Federal Practice* ¶ 0.161[2]).

Determining whether there has been a fraudulent joinder may require a court to "look beyond the allegations of plaintiffs' complaint," *Abels*, 770 F.2d at 32, and examine the underlying facts. However, such "pierc[ing of] the pleadings" should be of "limited" scope. *Boyer*, 913 F.2d at 111. Furthermore, "[b]ecause a party who urges jurisdiction on a federal court bears the burden of proving that jurisdiction exists, a removing party who charges that a plaintiff has fraudulently joined a party to destroy diversity of jurisdiction has a 'heavy burden of persuasion.'" *Id.* (quoting *Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1012 n.6 (3d Cir. 1987)).

Further, the Third Circuit has emphasized that the inquiry as to whether the plaintiff's state-court complaint asserts a "colorable" claim against the challenged defendant is *not* coextensive with the inquiry required by a 12(b)(6) motion to dismiss. *E.g.*, *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 852 (3d Cir. 1992) ("[T]he inquiry into the validity of a complaint triggered by a motion to dismiss under Rule 12(b)(6) is more searching than that permissible when a party makes a claim of fraudulent joinder. Therefore, it is possible that a party is not fraudulently joined, but that the claim against that party ultimately is dismissed [in state court] for failure to state a claim . . . . [T]he district court erred in converting its jurisdictional inquiry into a motion to dismiss."); *see also Boyer*, 913 F.2d at 112. Instead, in determining whether a claim is colorable in state court for the purposes of deciding a motion to remand,

> [a] district court must resolve all contested issues of substantive fact . . . [and] any uncertainties as to the current state of controlling substantive law in favor of the plaintiff. If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court.

Boyer, 913 F.2d at 111 (citations and internal quotation marks omitted); *see also Batoff*, 977 F.2d at 852 (stating that remand is required unless claims are "not even colorable, i.e., [a]re wholly insubstantial and frivolous").

Application to plaintiffs' claim against OBIC

In applying the above standard to the instant case, therefore, the dispositive question is whether plaintiffs' unilateral contract theory is "colorable" under

Pennsylvania law. "Colorable" in this context incorporates the language cited above—i.e. "even a possibility that a state court would find that the complaint states a cause of action," *Boyer*, 913 F.2d at 111—and, if plaintiffs' claim is colorable, remand is appropriate "even if [the claim] ultimately may not withstand a motion to dismiss in the state court." *Batoff*, 977 F.2d at 853.

OBA appears to be correct in its description of the elements of a unilateral contract: "(1) the offer by defendant, (2) the consideration promised by him, (3) the allegation setting forth the performance of the requested acts by plaintiff, (4) the alleged breach of the completed unilateral contract by defendant, and (5) a claim for the resulting damages." (Def.'s Br. Supp. Mot. Dismiss 11–12 (citing *Matsinger v. Proctor & Schwartz, Inc.*, 44 Pa. D. & C. 367 (Phila. County 1942)).[4]) According to the complaint, a law firm representing OBIC stated that if plaintiffs performed certain acts to establish their claim for damage to their home from defective stucco, OBIC would respond in a timely manner with a settlement offer or a notice that no offer would be made. Plaintiffs allegedly performed their part of the bargain, while OBIC failed to perform its part by responding to their claims. And plaintiffs allege they were damaged. Therefore, plaintiffs' complaint appears to state the basic elements of a unilateral contract claim.

[4] Plaintiffs also cite the concurring opinion of Justice Roberts in *Herman v. Stern*, 213 A.2d 594 (Pa. 1965), stating that in a unilateral "contract, the very act of performing that which has been requested by the offeror is both the consideration for the promise sought to be enforced and the acceptance of the offer for the contract." *Id.* at 602–603 (Roberts, J., concurring).

Although OBA advances a litany of arguments in support of its contention that plaintiffs' claim against OBIC is groundless, these arguments are insufficient, alone or in combination, to establish that plaintiffs' claim is "wholly insubstantial and frivolous." OBA's arguments that OBIC could not have been bound by the actions of its law firm on the facts stated, and that plaintiffs' unilateral-contract claim is an impermissible "direct action" against an insurer, are not supported by the precedents relied on by OBA, none of which is directly analogous to the facts of the instant case. For example, while OBA may be correct that, in the context of conflicts of interest arising during litigation, "[w]hen a liability insurer retains counsel to defend an insured, the insured is considered the client," *Kvaerner U. S., Inc. v. One Beacon Ins. Co.*, 74 Pa. D. & C. 4th 32, 2005 Phila. Ct. Com. Pl. LEXIS 377, at *15 (Phila. County 2005), it does not necessarily follow that, under Pennsylvania law, an attorney cannot act as an agent for an insurer for the non-litigation purpose of setting up an administrative claims process.

Similarly uncompelling is OBA's insistence that it, and not OBIC, was the insurer of Gambone. First, the evidence offered of an insurance contract between OBA and Gambone in no way negates the possibility of a separate contract between OBIC and Gambone. (*Cf.*, *e.g.*, Pl.'s State Compl. ¶ 11 (asserting that Gambone had numerous "insurers").) Moreover, OBA offers no evidence that affiant Kevin F. Curry—an *OBA* employee—has authority to speak on behalf of OBIC or to deny that OBIC was an insurer of Gambone. Finally, the complaint itself does not purport to base its claim on an

insurance contract, but rather on the alleged unilateral contract formed between plaintiffs and OBIC.

In sum, plaintiffs have chosen to sue a non-diverse party in state court. The brief analysis above is sufficient to establish that plaintiffs' claim is not "frivolous" to the point that OBA can meet its "heavy burden" to show that OBIC is a fraudulently-joined party which should not be counted for diversity purposes. *Cf. Batoff*, 977 F.2d at 853 ("We . . . do not suggest that our inquiry into Pennsylvania law has been penetrating, but it should not be, for if we made such an inquiry we would have decided this diversity case on the merits, even though the parties are not diverse."). OBIC's continuing presence deprives this court of subject matter jurisdiction, *see* 28 U.S.C. §§ 1332(a), 1441(a)–(b), and therefore remand is the proper course. *See id.* § 1447(c). As to the prospects of plaintiffs' suit in state court, it is not for this court to "purport to express an opinion . . . nor . . . suggest that a [Pennsylvania] court must find as a matter of law that valid claims have been stated." *Batoff*, 977 F.2d at 854 (internal quotation marks omitted) (alteration in original).

Conclusion

Because plaintiffs' state law complaint names a non-diverse, non-fraudulently-joined defendant, (1) this court lacks jurisdiction over this state-law action, (2) removal was improper, and (3) plaintiffs' motion will be granted and the action remanded to the Court of Common Pleas of Philadelphia County. OBA's motion to dismiss plaintiffs'

complaint for failure to state a claim upon which relief can be granted will be dismissed as moot. An appropriate Order follows.

ORDER

For the reasons given above, it is hereby **ORDERED** that plaintiffs' Motion to Remand is **GRANTED**, the motion to dismiss filed by OneBeacon America is **DISMISSED** as moot, and this case is **REMANDED** to the Court of Common Pleas of Philadelphia County.

BY THE COURT:

/s/ Louis H. Pollak

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Pollak, J.